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Supreme Court of the United States

October Term, 1976

No. 76-1030

STATE OF MINNESOTA, by its Attorney General
WARREN SPANNAUS, and its
POLLUTION CONTROL AGENCY,
Appellant,

vs.

MARTIN R. HOFFMAN, Secretary,
DEPARTMENT OF THE ARMY, et al.,
Appellees.

ON APPEAL FROM, AND PETITION FOR CERTIORARI TO,
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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ON APPEAL FROM, AND PETITION FOR CERTIORARI TO,
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of the Eighth Circuit Court of Appeals which held that the Federal Water Pollution Control Act Amendments of 1972 [1] do not require the United States Army Corps of Engineers to comply with Minnesota's water quality standards and effluent limitations during

[1] 86 Stat. 816, 33 U.S.C. §1251 *et seq.* (Supp. IV, 1975).

the Corps' dredging operations within Minnesota.[2] In the alternative, Appellant seeks review of the Court of Appeals' judgment by writ of certiorari and respectfully requests this Court to consider this document as a petition for a writ of certiorari.

CITATION TO OPINION BELOW

The opinion of the District Court is reported at 401 F.Supp. 524; the opinion of the Eighth Circuit Court of Appeals at 543 F.2d 1198. The text of these opinions is set forth in Appendix B and C, respectively, pages A-11 to A-45.

JURISDICTION

1. *The Nature of the Proceeding.* Appellant instituted this action in the Third Division of the Federal District Court for the District of Minnesota seeking a declaratory judgment that the Corps of Engineers' dredging activities within the State of Minnesota must be carried out in compliance with State laws and regulations. The complaint is set forth in Appendix A. The proceedings below were instituted pursuant to 28 U.S.C. §2201. Jurisdiction was based on 33 U.S.C. §1365, 28 U.S.C. §1331 and 5 U.S.C. §§701 *et seq.*

2. *The Judgment or Decree Sought to Be Reviewed.* On October 9, 1975, the District Court, on cross-motions for summary judgment, granted Appellant's (Plaintiff-Appellee below) motion and denied Appellees' (Defendants-Appellants

[2] The Court of Appeals also held that the Corps was not required to obtain discharge permits from Minnesota. The permit issue has been settled by this Court in Environmental Protection Agency v. California ex rel State Water Resources Control Board, 426 U.S. 200 (1976). Therefore, Appellant does not appeal from that portion of the Court of Appeals' decision.

below) motion. Notice of Appeal was filed on November 14, 1975. The Eighth Circuit Court of Appeals reversed the District Court and entered judgment for Appellees on October 28, 1976 (Appendix D(1), pages A-45 to A-46). The Notice of Appeal to this Court was filed in the United States Court of Appeals for the Eighth Circuit on January 4, 1977 (Appendix D(2), pages A-46 to A-47).

3. *The statutory provision which confers jurisdiction on this Court* to review by direct appeal cases in the courts of appeal is 28 U.S.C. §1254(2).[3]

4. *Cases believed to sustain this Court's jurisdiction include: City of Detroit, et al. v. Murray Corporation of America, et al.*, 355 U.S. 489, (1958) reh. den. 357 U.S. 913 (1958).[4]

5. *Statutes and Regulations involved in this appeal.* Supremacy Clause of the United States Constitution, Article VI, Clause 2; Sections 101, 313, 402, 404, 502, 510 and 511 (33 U.S.C. §§1251, 1323, 1342, 1344, 1362, 1370 and 1371) of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. §§1251 *et seq.*; Minn. Stat. §§115.01, 115.03 and 115.45; Minn. Regs. WPC 15 and 25. These statutes and regulations are set forth in Appendices E, F and G respectively, pages A-47 to A-117.

[3] If this Court determines that a direct appeal does not lie, Appellant respectfully urges the Court to consider this jurisdictional statement as a petition for certiorari. 28 U.S.C. §2103. In addition, jurisdiction to review by writ of certiorari cases in the courts of appeal is conferred on this Court by 28 U.S.C. §1254(1).

[4] If this Court determines that a direct appeal does not lie, the cases believed to sustain this Court's jurisdiction to review by writ of certiorari include: Environmental Protection Agency v. v. California ex rel State Water Resources Control Board, 426 U.S. 200 (1976); Doran v. Salem Inn. Inc., 422 U.S. 922 (1975); Forna's v. Ridge Tool Co., 400 U.S. 41 (1970); El Paso v. Simmons, 379 U.S. 497 (1965); Leiter Minerals, Inc. v. U.S., 352 U.S. 220, reh. den. 352 U.S. 1019 (1957).

QUESTIONS PRESENTED

The ultimate question presented by this appeal is whether the Federal Water Pollution Control Act Amendments of 1972 (hereafter "FWPCA" or "Act") require the Corps of Engineers to comply during its dredging operations in Minnesota with the State's water quality standards and effluent limitations, Specifically, this appeal raises the issues of:

1. Whether Section 313 of the FWPCA is a clear and unequivocal waiver of federal immunity from state regulation?

2. Whether Section 313 of the FWPCA requires the Corps of Engineers to comply with Minnesota's water quality standards and effluent limitations?

STATEMENT OF THE CASE

1. *The Factual Setting*

The facts in this case are undisputed [5] and are more fully set forth in Appendix A. Briefly, the Corps of Engineers conducts extensive dredging operations within Minnesota. These dredging activities involve removing portions of the bottom sediments of lakes and rivers and depositing the removed sediments into other portions of lakes or rivers or on land. This operation causes the pollutants in the bottom sediment to be redissolved and resuspended in the water. The effect of this dredging on Minnesota's waters is to degrade the water and to produce a habitat that is harmful to the growth, reproduction and survival of water dwelling organisms. These dredging activities result in violations of Minnesota water quality standards and effluent limitations.

[5] At oral argument before the District Court, the parties agreed that there were no issues of material fact. State of Minnesota, Spannaus v. Callaway, 401 F. Supp. 524, 526, n. 1 (D. Minn. 1975).

2. *The Statutory Scheme*

This case involves the Federal Water Pollution Control Act Amendments of 1972[6] (hereafter "FWPCA" or "Act") and the interrelationship of that Act with Minnesota's water pollution statutes and regulations.

a. *The FWPCA*

In 1972, Congress recognized that prior efforts at abating and eliminating water pollution in the United States had been ineffective. After a two year study, the Senate Committee on Public Works concluded that "the national effort to abate and control water pollution has been inadequate in every vital aspect." [7] In response to this problem, Congress enacted the FWPCA. This Act established a comprehensive and complex program designed to attack the various sources and causes of water pollution.

At the outset, Congress established as a national goal the elimination of the discharge of pollutants into the nation's navigable waters by 1985.[8] To attain this goal, the FWPCA established a number of regulatory programs. Thus, the Act includes permit programs for point source [9] discharges,[10] dredged and fill material,[11] and federal aquaculture projects.[12] In addition, there is a federal grants program for the construc-

[6] 86 Stat. 816, 33 U.S.C. §1251 *et seq.* (Supp. IV, 1975).
[7] S. Rep. No. 92-414, p. 7 (1971), 2 Legislative History of the Water Pollution Control Act Amendments of 1972, Ser. No. 93-1, p. 1425 (1973) (hereafter "Leg. Hist.").
[8] Section 101(a)(1), 33 U.S.C. §1251(a)(1) (Supp. IV, 1975).
[9] Point sources are defined by section 502(14), 33 U.S.C. §1362(14) (Supp. IV, 1975) as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."
[10] Section 402, 33 U.S.C. §1342 (Supp. IV, 1975).
[11] Section 404, 33 U.S.C. §1344 (Supp. IV, 1975).
[12] Section 318, 33 U.S.C. §1328 (Supp. IV, 1975).

tion of waste treatment works,[13] and a planning program for the control of non-point source water pollution.[14] Further, the Act adopted effluent limitations [15] as the primary water pollution control standard. However, the system of water quality standards that had been established for interstate waters under the prior act were expressly continued in force.[16] The Act provides that all "discharges of pollutants" are unlawful,[17] unless the discharge is in compliance with appropriate effluent limitations,[18] water quality related effluent limitations,[19] national standards of performance for new sources,[20] effluent standards for toxic pollutants,[21] federal aquaculture permits,[22] and federal or state NPDES permits.[23]

In essence, the FWPCA rejects the view that there is social utility in using the nation's waters as a waste disposal and treatment system.[24] The Act requires treatment of those wastes prior to entry into the water and mandates that water pollution must be eliminated to the fullest extent that technology will permit.

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[13] Sections 201 through 207, 33 U.S.C. §§1281 through 1287 (Supp. IV, 1975).
[14] Section 208, 33 U.S.C. §1288 (Supp. IV, 1975).
[15] Section 502(11), 33 U.S.C. §1362(11) defines "effluent limitations" as restrictions on "quantities, rates and concentrations of chemical, physical, biological and other constituents" of discharges from point sources.
[16] Section 303(a)(1), 33 U.S.C. §1313(a)(1) (Supp. IV, 1975).
[17] Section 301(a), 33 U.S.C. §1311(a) (Supp. IV, 1975).
[18] Section 301(b), 33 U.S.C. §1311(b) (Supp. IV, 1975).
[19] Section 302, 33 U.S.C. §1312 (Supp. IV, 1975).
[20] Section 306, 33 U.S.C. §1316 (Supp. IV, 1975).
[21] Section 307, 33 U.S.C. §1317 (Supp. IV, 1975).
[22] Section 318, 33 U.S.C. §1328 (Supp. IV, 1975).
[23] Section 402, 33 U.S.C. §1342 (Supp. IV, 1975).
[24] 2 Leg. Hist. at 1274.

b. *Minnesota Law*

Minnesota has vigorously carried out its responsibilities and duties under the FWPCA. The State has adopted a comprehensive set of water pollution laws.[25] These include administration of the NPDES permit program and the Federal construction grants program. In addition, the state has its own state permit program[26] for the operation and construction of disposal systems and a state construction grants program to supplement the federal grants.[27] In essence, the State has an effective program for the regulation and control of water pollution.

The principal State laws at issue in this case are Minn. Stat. §115.45 (1974) and Minn. Reg. WPC 15. Minn. Stat. §115.45 imposes a duty upon every person to comply with "all regulations, . . . and to do and perform all acts and things within his or its power required to effectuate, carry out and accomplish the purposes of such provisions, regulations . . . ." Person is defined by Minnesota law[28] to include "any governmental subdivision."

Minn. Reg. WPC 15, a regulation duly adopted by the Minnesota Pollution Control Agency,[29] contains both water quality standards and effluent limitations, which, Appellant contends, apply to the Corps of Engineers' dredging operations in Minnesota.[30] This regulation has been approved by EPA

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[25] Minn. Stat. ch. 115 and 116 *et seq.*; Minn. Regs. WPC 1 through 32, 34, 36 and 37.
[26] Minn. Stat. §115.07 (1974), Minn. Reg. WPC 36.
[27] Minn. Reg. WPC 34.
[28] Minn. Stat. §115.03 subd. 10 (1974).
[29] Minn. Reg. WPC 15 is set forth in Appendix G (4), pages A-76 to A-108.
[30] Minn. Regs. WPC 2, 3, 6, 18, 28 and 29 also apply to lakes and rivers dredged by the Corps.

as conforming to the requirements of §303 of the FWPCA.[31] Minn. Reg. WPC 15(c)(2) prohibits the discharge of sewage, industrial wastes or other wastes[32] into any interstate waters of the State ". . . so as to cause any nuisance conditions, such as significant amounts of floating solids, . . . excessive suspended solids, material discoloration, . . . or other offensive or harmful effects."

3. *The Proceedings Below*

On April 17, 1975, Minnesota brought an action for a declaratory judgment against the United States Army Corps of Engineers and Howard H. Callaway,[33] Secretary of the Army; Lieutenant General William C. Gribble, Chief of Engineers; and Colonel Max Noah, District Engineer, both individually and in their official capacities. The suit sought a determination that the FWPCA requires the Corps' dredging operations within Minnesota be carried out in compliance with state laws and regulations.

The Corps moved to dismiss on July 11, 1975, alleging that the District Court lacked subject matter jurisdiction and that the complaint failed to state a claim upon which relief could be granted. At oral argument, the parties agreed that there were no issues of material fact and that the case should be considered as if submitted on cross motions for summary judgment.

[31] 40 C.F.R. §120.10 (1976); letter dated November 6, 1973, from Francis Mayo, Regional Administrator, Region V, U.S. EPA to Governor Wendell Anderson, Minnesota.
[32] Minn. Stat. §115.01 subd. 4 (1974) defines "other waste' as specifically including dredge spoil.
[33] During these proceedings, Martin R. Hoffman succeeded Howard H. Callaway as Secretary of the Army.

On October 9, 1975, the District Court granted Minnesota's motion for summary judgment and denied the Corps' motion. The Corps filed its Notice of Appeal to the Eighth Circuit Court of Appeals on November 14, 1975.

The Court of Appeals, on October 26, 1976, reversed the District Court and held that the FWPCA does not require the Corps to obtain a discharge permit from Minnesota for its dredging operations or to comply with Minnesota's water pollution statutes and regulations during the Corps' dredging activities. Minnesota filed its Notice of Appeal to this Court on January 4, 1977.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This case presents this Court with the opportunity to define fully the proper relationship between the federal government and the states with respect to state environmental law. The Court began this task in *Hancock v. Train*[34] and *EPA v. California ex rel. State Water Resources Control Board*[35] when it addressed the issue of federal compliance with state permitting procedures. This appeal raises the remaining important issue that is essential to a complete understanding of federal-state relationships in the field of pollution control; federal compliance with substantive state environmental standards. As this Court recognized in *Hancock* and *California*, the issue of federal compliance with state law is important and presents substantial questions.

The states historically have had a substantial interest in regulating and protecting their own waters. *Askew v. Ameri-*

[34] 426 U.S. 167 (1976).
[35] 426 U.S. 200 (1976).

can Waterways Operators, Inc., 411 U.S. 325 (1973).[36] Congress, when it enacted the FWPCA, recognized that the states were primarily responsible for regulating water pollution and clearly and unequivocally preserved the states' authority to adopt and enforce water pollution standards. Further, this Court's opinions in *Hancock*[37] and *California*[38] support the conclusion that federal entities must comply with substantive state pollution requirements.

The Court of Appeals, however, in reversing the District Court, applied the rationale of *Hancock* and *California* not only to state pollution permitting requirements but also to state substantive water pollution control standards. This conclusion is contrary to the FWPCA's express language, the Act's legislative history, and the *Hancock* and *California* decisions.

Therefore, the questions presented by this appeal are important to the states not only because of their traditional role of protecting their own waters but also because this Court will authoritatively resolve the substantial question of the federal government's compliance with the states' substantive water pollution control statutes and regulations.

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[36] *See also* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960), involving air pollution.
[37] 426 U.S. 167 (1976).
[38] 426 U.S. 200 (1976).

1. Section 313 of the FWPCA is a Clear and Unambiguous Waiver of Federal Immunity from State Regulation Which Requires Federal Entities to Comply with State Water Quality Standards

Section 313[39] of the FWPCA expressly directs the federal government to comply with state standards. Although the usual rule, based on the Supremacy Clause of the United States Constitution,[40] is that the federal government is immune from state regulation,[41] it is clear that Congress may waive this immunity and allow the state regulation of federal instrumentalities. *Mayo v. United States*, 319 U.S. 441 (1943); *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285 (1943). This waiver is found when Congress by specific action or a clear mandate authorizes state regulation. *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954).

Section 313 is the only provision in the FWPCA that addresses the relationship between the federal government and the states regarding compliance with water pollution control requirements. This section is a clear and unambiguous waiver of federal immunity and expressly mandates all federal entities to comply with state requirements respecting the control and abatement of pollution. The language of the section is explicit and mandatory:

> Each department, agency or instrumentality of the executive, legislative and judicial branches of the *federal government . . . shall comply with federal, state,* interstate, and local requirements respecting control and abatement of pollution . . . .

(Emphasis added.)

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[39] 33 U.S.C. §1323 (Supp. IV, 1975).
[40] Article VI, Clause 2.
[41] Hancock v. Train, *supra*, at 179; EPA v. California, *supra*, at 211.

There is no doubt that the Corps of Engineers is an instrumentality of the federal government. Consequently, section 313 directs the Corps to comply with state requirements respecting control and abatement of pollution.[42] As the District Court stated, §313 is an "unqualified order to comply."[43]

Despite the clear language of §313, the Court of Appeals concluded ". . . that there was insufficient evidence for finding Congressional authorization for state regulation . . ." of the Corps' dredging activities.[44] In reaching this conclusion, the Court of Appeals relied upon section 404[45] of the Act and this Court's opinions in *Hancock* and *California*. This reliance is misplaced.

Section 404 is silent with respect to the Corps' obligations to comply with the State's water quality and effluent standards. There is absolutely no indication in that section that the Corps or anyone else is immune from state regulation. Section 404 merely establishes a permit program for the disposal of dredged and fill material.[46] Thus, the Court of Appeals' conclusion that section 404 precludes compliance with state stan-

[42] The Corps' own regulation for the administration of the §404 permit program provides that federal dischargers must comply with state standards. 33 C.F.R. §209.120(e)(4)(ii) (1976). While the Corps procedurally processes its own projects under 33 C.F.R. §209.145 (1974), that regulation cites §313 of the Act as applicable to the Corps. 33 C.F.R. §209.145(b) (1974).

[43] State of Minnesota, Spannaus v. Callaway, *supra*, at 530.

[44] State of Minnesota by Spannaus v. Hoffman, *supra*, at 1209.

[45] 33 U.S.C. §1344 (Supp. IV, 1975).

[46] When Congress intended federal dischargers not to comply with state requirements, they expressly exempted the federal government. Thus, section 306(c), 33 U.S.C. §1316(c), which authorizes states to develop a procedure for applying and enforcing new source performance standards, expressly exempts federal dischargers. Similarly section 308(c), 33 U.S.C. §1318(c), which permits the states to develop procedures for the inspection, monitoring and entry onto a discharger's premises, also exempts the federal government. It is obvious that Congress knew how to exempt federal facilities from state regulation. If Congress had intended the Corps not to comply with state water quality standards and effluent limitations, they would have expressly provided for such an exemption in the Act.

dards is erroneous and contrary to the express language of both section 313 and section 404.

Further, the Court of Appeals has misunderstood the legal significance of the *Hancock* and *California* decisions. Those cases involved whether federal instrumentalities were required to comply with state permitting requirements; essentially whether the federal government was required to follow state procedural requirements. The Court of Appeals relied on those cases in reaching its conclusion that the federal government is not required to comply with either state procedural or substantive requirements. This conclusion is not sustainable by the language in those cases. In *Hancock*, this Court observed "[t]he parties *rightly* agree that §118[47] obligates federal installations to conform to state air pollution standards or limitations. . . ."[48] (Emphasis added.) Similarly, in *California* the Court quoted with approval the conclusion of the lower court that "'. . . the legislative history of Section 313 refers simply and solely to substantive' standards . . . ."[49] Thus, it is clear that Congress in section 313 waived federal immunity from state regulation and ordered all federal entities to comply with all water pollution standards—federal, state and local. The Court of Appeals erred in not so holding.

Finally, the effect of the Court of Appeals' decision is to read into §313 an exemption for the Corps where none exists. This results in rendering that section a nullity as applied to the Corps. It is illogical to conclude that Congress explicitly directed all federal instrumentalities to comply with state pollution standards but implicitly intended to exclude the Corps,

[47] Section 118 of the Clean Air Act is virtually identical to §313. EPA v. California, *supra*, at 212.

[48] Hancock v. Train, *supra*, at 181.

[49] EPA v. California, *supra*, at 215.

a major federal discharger. The inescapable conclusion is that section 313 requires the Corps to comply with State water quality standards and effluent limitations during its dredging operations.

2. Compliance With State Standards by the Corps is Consistent With the Expressed Policy of the Act and Essential to Achieving the Act's Objective

Congress declared in §101(b) of the FWPCA that national policy was "to recognize, preserve and protect the primary responsibility of the states to prevent, reduce, and eliminate pollution." [50] This declaration recognizes the traditional interest of the states in protecting their own waters. Further, Congress established as a national goal the elimination of the discharge of pollutants into the nation's navigable waters by 1985.[51] Finally, section 510 of the Act[52] expressly preserves the states' authority to adopt or enforce any standard or limitation, including more stringent ones, respecting discharges of water pollutants. Congress was obviously aware that state regulation had to be an integral part of any national pollution control program. Thus, Congress ensured that state authority in this area was not diminished. In fact, as this Court observed in *California*, section 510 was intended to strengthen state authority.[53]

In addition, the state standards which federal instrumentalities must comply with are federally approved standards. Section 303 of the Act [54] requires the states to develop and adopt water quality standards that are satisfactory to the

[50] 33 U.S.C. §1251(b) (Supp. IV, 1975).
[51] Section 101(a)(1), 33 U.S.C. §1251(a)(1) (Supp. IV, 1975).
[52] 33 U.S.C. §1370 (Supp. IV, 1975).
[53] EPA v. California, *supra*, at 218.
[54] 33 U.S.C. §1312 (Supp. IV, 1975).

United States Environmental Protection Agency (EPA). Thus, this case does not present the situation where the states are attempting to force the federal government to comply with unreasonable local restrictions. To the contrary, Appellant seeks compliance with standards that have been approved by a major federal agency.[55]

The Court of Appeals' holding is contrary to this express Congressional policy and effectively undermines the national goal of eliminating the discharge of pollutants into the nation's waters by 1985. Compliance by all sources—federal, state and local—with the states' water quality and effluent standards is an essential step in achieving this "no-discharge goal." It is absurd to conclude that Congress charged the states with the primary responsibility for achieving the national "no-discharge" goal but precluded them from requiring federal dischargers, a major source of pollution, to comply with the states' substantive water pollution control standards, the critical means for meeting that goal.

3. Compliance With State Standards as Mandated by the FWPCA Will Not Interfere with the Corps' Responsibility to Maintain Navigation

Appellant recognizes that the Corps has an obligation to maintain navigation. The FWPCA acknowledges that duty.[56] However, compliance with state water pollution standards only requires the Corps to discharge their duties in an en-

[55] If a state fails to adopt water quality standards, section 303 requires the Administrator of EPA to promulgate the water quality standards for the state. Thus, if Minnesota had not adopted standards for her waters, the Administrator of EPA would have been required to do so by the FWPCA. The Corps could not have objected to compliance with EPA standards on the basis of the alleged federal immunity.
[56] Section 511, 33 U.S.C. §1371 (Supp. IV, 1975).

vironmentally sound manner. This compliance is necessary if the national goal of eliminating the discharge of pollutants[57] into navigable waters by 1985 is to be achieved.

Congress recognized the possibility that compliance by federal agencies, such as the Corps, with state standards might severely affect the activities of the federal government. Consequently, Congress expressly provided that an exemption from state pollution control requirements may be granted by the President when he determines that an exemption would be in the "paramount interest of the United States."[58] Therefore, if the Corps found that compliance with Minnesota's standards adversely impacted the Corps' duty to maintain navigation, they could apply for a Presidential exemption. The Corps has not sought a Presidential exemption from the requirements of section 313 and none has been granted. In fact, to the contrary, the President has directed federal agencies to ensure that their facilities conform to "Federal, State, interstate and local water quality standards and effluent limitations . . . ."[59]

Therefore, the Court of Appeals' concern that the Corps' compliance with state standards would interfere with its duty to maintain navigation is unfounded. The FWPCA creates a method for exempting compliance on a case-by-case basis if circumstances warrant it. The Corps should be required to follow those procedures. As the District Court observed, compelling the Corps to comply with state requirements ". . .

[57] Since "dredged spoil" is specifically defined by §502(6), 33 U.S.C. §1362(6) (Supp. IV, 1975), as a "pollutant," the dredging activities of the Corps result in a discharge of pollutants to the navigable waters of the United States.

[58] Section 313, 33 U.S.C. §1323 (Supp. IV, 1975).

[59] Exec. Order No. 11752, 3 C.F.R. ch. IV, p. 380 (1974).

would merely require . . . the Corps . . . to accomplish [its] mission in compliance with effluent limitations established pursuant to the Act."[60]

CONCLUSION

For the reasons set forth, the Court should note probable jurisdiction, or grant certiorari, and set the case down for plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

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[60] State of Minnesota, Spannaus v. Callaway, *supra*, at 531.